(3)

No. 90-1038

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS CIPOLLONE,

Petitioner,

v.

LIGGETT GROUP, INC., A Delaware Corporation; PHILIP MORRIS INCORPORATED, A Virginia Corporation; and LOEW'S THEATRES, INC., A New York Corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

---

MEMORANDUM OF THE RESPONDENTS

JAMES V. KEARNEY
WEBSTER & SHEFFIELD
237 Park Ave.
New York, NY 10017
(212) 808-6000

Attorney for Liggett Group, Inc.

DAVID K. HARDY
SHOOK, HARDY & BACON
One Kansas City Place
1200 Main St.
Kansas City, MO 64105
(816) 474-6550

Attorney for Loew's Theatres, Inc.

MELVIN SPAETH*
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6669

Attorney for Philip Morris Incorporated

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether the Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340 (1988), which expressly forbids any legal requirement of a warning on cigarette packages other than that prescribed by Congress, and which also expressly forbids the imposition of any health-related "requirement or prohibition . . . under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter," 15 U.S.C. § 1334, permits courts to impose liability under state law in personal injury lawsuits for alleged inadequacies in the warning label or alleged improprieties in the advertising or promotion of properly labeled cigarettes.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1038

THOMAS CIPOLLONE,

Petitioner,

v.

LIGGETT GROUP, INC., A DELAWARE CORPORATION; PHILIP MORRIS INCORPORATED, A VIRGINIA CORPORATION; AND LOEW'S THEATRES, INC., A NEW YORK CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

MEMORANDUM OF THE RESPONDENTS

Respondents agree with petitioner that the Court should grant the petition for certiorari in this case.[1]

OPINIONS BELOW

The opinions of the court of appeals, Petitioner's Appendix ("Pet. App.") 1a-93a and 95a-108a are re-

---

[1] The court may wish to consider the question presented as recast by respondents, which somewhat more accurately describes the conflict in the lower courts and comprehends both issues stated in the petition.

ported at *Cipollone* v. *Liggett Group, Inc.*, 893 F.2d 541 (3rd Cir. 1990), and *Cipollone* v. *Liggett Group, Inc.*, 789 F.2d 181 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987). The district court's opinion of September 20, 1984, Pet. App. 109a-162a, is reported at *Cipollone* v. *Liggett Group, Inc.*, 593 F. Supp. 1146 (D.N.J. 1984).

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1990. The court of appeals denied petitioner's petition for rehearing *in banc* on January 31, 1990. The court of appeals denied respondents' timely petition for rehearing on August 30, 1990. On November 21, 1990, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including December 28, 1990, and the petition was filed on that date. On January 24, 1991, respondents obtained an extension of time within which to file a response to the petition until March 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTE INVOLVED

The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340, is reproduced at Respondent's Appendix ("Resp. App."), at 1a-5a.

STATEMENT

This diversity action under New Jersey product liability law was initiated by Rose D. Cipollone and her husband, Antonio Cipollone, against Liggett Group,

Inc., Philip Morris Inc., and Loew's Theatres, Inc.[2] Plaintiffs, invoking a variety of product liability theories, alleged that Rose Cipollone developed lung cancer because, for some 40 years, she smoked cigarettes manufactured by respondents.

Respondents raised the defense, among others, that certain of the plaintiffs' claims were preempted by the Federal Cigarette Labeling and Advertising Act (the "Act" or the "Labeling Act"), 15 U.S.C. §§ 1331 *et seq.*[3] That Act specifies the health warning that

---

[2] The parties appearing in the United States Court of Appeals for the Third Circuit were Antonio Cipollone, individually and as executor of the estate of Rose D. Cipollone, appellee below, and three cigarette manufacturers: Liggett Group, Inc., Philip Morris Incorporated, and Loew's Theatres, Inc., appellants below. The petitioner for this writ of certiorari is Thomas Cipollone (the alternate executor of the estate of Rose D. Cipollone and the individual allegedly to be substituted as executor for the estate of Antonio Cipollone). All the subsidiaries of Philip Morris Companies Inc., the parent of respondent Philip Morris Incorporated, are wholly-owned. At the time the instant suit was initiated, Lorillard was an unincorporated division of respondent Loew's Theatres, Inc. Thereafter, Lorillard was incorporated as "Lorillard, Inc.", a wholly-owned subsidiary of Loews Corporation, the corporate successor to Loew's Theatres, Inc. Loews Corporation has two subsidiaries that are not wholly-owned by it: CNA Financial Corporation and Bulova Corporation. Respondent Liggett Group, Inc., which has changed its name to Brooke Group Ltd., has three subsidiaries that are not wholly-owned: MAI Systems Corporation, Western Union Corporation and Liggett Myers Tobacco Company of Canada Limited.

[3] Unless otherwise indicated, citations to sections of the Act are to the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282, as amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat.

must be communicated to the public (§ 1333), provides that "[n]o statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package" (§ 1334(a)), and forbids the imposition "under State law" of any "requirement or prohibition based on smoking and health" with respect to "the advertising or promotion of any cigarettes" labeled in conformity with the Act (§ 1334(b)). It is undisputed that respondents' cigarettes were at all times labeled in conformity with the Act.

The district court (Sarokin, J.) granted plaintiffs' motion to strike the companies' preemption defense. (Pet. App. 109a-162a). The court concluded that the Act's preemption provisions apply to state statutes and regulations, but not to the imposition of damages liability. The court certified the preemption issue for interlocutory appeal under 28 U.S.C. § 1292(b)(1988).

A unanimous panel of the court of appeals reversed (Pet. App. 95a-108a). The court held

> that the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. We further hold that where the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required

87, codified at 15 U.S.C. §§ 1331 *et seq.* The Act was further amended in 1984 by the Comprehensive Smoking Education Act, Pub. L. No. 98-474, 89 Stat. 2200.

> on cigarette packages, such claims are preempted as conflicting with the Act.

789 F.2d at 187 (Pet. App. 106a). Plaintiffs filed a petition for certiorari in this Court, which was denied (Pet. App. 94a).

On remand, the district court applied the court of appeals' ruling to the theories alleged in the complaint and dismissed some of these as preempted—plaintiffs' post-1965 failure to warn, conspiracy, express warranty, and intentional misrepresentation claims. After presentation of the plaintiffs' case, the court directed a verdict for the defendants on plaintiffs' claim that the defendants failed to use a safer alternative design.

Following a four-month trial, the jury found for defendants on plaintiffs' major claims relating to allegations of pre-1966 fraudulent misrepresentation and conspiracy. The jury found for plaintiffs on the pre-1966 express warranty claim against Liggett. The jury concluded that Rose Cipollone had sustained no damages, but returned a verdict of $400,000 for Antonio Cipollone. The jury also found that Liggett had failed adequately to warn Mrs. Cipollone of the hazards of smoking for some time prior to January 1, 1966, when the Act's warning labels began to appear on cigarette packages; however, the jury apportioned 80% of the responsibility for Mrs. Cipollone's injuries to her own behavior. It followed that there could be no liability on this claim under New Jersey's comparative fault rules.

All parties appealed. The court of appeals reversed the judgment in favor of Antonio Cipollone on the express warranty claim, holding that the district court's instructions were erroneous. As the petition

indicates, the court of appeals affirmed the district court's ruling that claims based on post-1965 failure to warn and advertising are preempted. The court of appeals also resolved various other issues that are not the subject of the instant petition and remanded for a new trial.

The petition concerns only the court of appeals' affirmance of the district court's ruling that plaintiffs' claims based on post-1965 failure to warn and advertising are preempted.

DISCUSSION

The holding of the court below that the Act preempts petitioner's state law claims for allegedly inadequate warnings and improper advertising is plainly correct. Nonetheless, respondents agree with petitioner that the case warrants review by this Court, to resolve a clear conflict among the lower courts.

1. Five federal courts of appeals, as well as several state and federal district courts, have held that the Act preempts certain state law damages actions arising from the labeling, advertising and promotion of cigarettes after January 1, 1966.[4] The court below,

[4] *Kotler* v. *American Tobacco Co.*, 59 U.S.L.W. 2432 (1st Cir. Dec. 19, 1990); *Pennington* v. *Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989); *Roysdon* v. *R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Stephen* v. *American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Cipollone* v. *Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987); *Palmer* v. *Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Gianitsis* v. *American Brands, Inc.*, 685 F. Supp. 853 (D.N.H. 1988); *Gunsalus* v. *Celotex Corp.*, 674 F. Supp. 1149 (E.D. Pa. 1987); *Rogers* v. *R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045 (Ind. Ct. App. 1990); *Forster* v. *R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655 (Minn. 1989); *Hite* v. *R.J. Reynolds Tobacco Co.*, 578 A.2d 417 (Pa. Super. Ct. 1990); *Phillips* v. *R.J. Reynolds Industries, Inc.*, 769 S.W.2d 488 (Tenn. Ct. App. 1988). In addition to these published opinions, there are also over 15 unpublished orders of state courts following the rulings of the five federal courts of appeals. On February 4, 1991, the Appellate Division of New York affirmed the grant of a motion for summary judgment on the ground of preemption, following the decision of the court below, in *McSorley* v. *Philip Morris, Inc.*, ___ N.Y.S.2d ___ (N.Y. App. Div. 1991) (Westlaw, 1991 WL 15073).

in the first and leading case on the issue, held that the Act preempts "those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes." 789 F.2d at 187 (Pet. App. 106a). In contrast, the Supreme Court of New Jersey held in *Dewey* v. *R. J. Reynolds Tobacco Co.*, 121 N. J. 69, 577 A.2d 1239 (1990) (Pet. App. 208a), that the preemption provisions of the Act apply only to state statutes or regulations, and therefore have no preemptive effect on state law damages actions. A result similar to that in *Dewey* was recently reached by one of the Texas Courts of Appeal. *Carlisle* v. *Philip Morris Inc.*, No. 3-89-175-CV (Texas Ct. App., 3d Dist., Feb. 6, 1991) (reproduced at Resp. App. 6a-49a).

The issue raised by the petition is important and recurring. There are currently 45 lawsuits pending against cigarette manufacturers on similar claims in state and federal courts sitting in 12 states. In cases filed in federal court, defendant manufacturers have been able to invoke the preemption provisions of the Act. In those cases filed in the state courts of New

Jersey and one of the appellate districts of Texas, the preemption defense is now not available. This issue is presently before three other state supreme courts.[5] The potential sources of conflicting interpretation could multiply if *Dewey* leads to the filing of many more such cases.[6] This Court's guidance is needed to preserve the uniformity of federal law.

Cases in New Jersey are governed by conflicting law, depending on whether they are filed in federal or state court. This is also true in part of Texas because of the *Carlisle* decision. This creates opportunities for forum shopping,[7] makes it impossible for consumers, retailers, or manufacturers operating in these states to anticipate their rights and obligations, and defeats the ideal reflected in the Rules of Decision Act, 28 U.S.C. § 1652 (1988), that substantive law in a jurisdiction be the same whether a case is brought in federal or in state court. See *Hanna* v. *Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) ("there should not be two conflicting systems of law controlling the primary activities of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs").

[5] *Rogers* v. *R.J. Reynolds Tobacco Co.*, 557 N.E.2d. 1045 (Ind. Ct. App. 1990); *Gilboy* v. *American Tobacco Co.*, 572 So.2d 289 (La. Ct. App. 1990); *Hite* v. *R.J. Reynolds Tobacco Co.*, 578 A.2d. 417 (Pa. Super. Ct. 1990). A review of the *Carlisle* decision will be sought by way of petition to the Texas Supreme Court.

[6] Frankel, *N.J. Tobacco Ruling Issued: Warning Labels Don't Protect Companies, Court Says*, Winston-Salem Journal, July 27, 1990, at 1, 4 (quoting John F. Banzhaf, Executive Director, Action on Smoking and Health) (predicting that *Dewey* "certainly opens the door to thousands, potentially tens of thousands, of suits by smokers and their estates").

[7] For example, one major cigarette manufacturer, R.J. Reynolds, is a New Jersey corporation. No case in which R.J. Reynolds is a defendant can be removed to the federal court in New Jersey under diversity jurisdiction. See Daynard, *Up From the Ashes: Cigarette Litigation and the "Dewey" Decision*, BNA Product Safety and Liability Reporter 1078, 1081 (Sept. 28, 1990). Plaintiffs have in a number of cases in other jurisdictions avoided removal by naming an instate distributor or retailer as a defendant.

2. *Dewey* and *Carlisle* rely on the argument that Section 1334 of the Act does not explicitly refer to common law or tort damage actions. But neither does it explicitly reference state statutes and administrative regulations—and all parties and courts agree that those are plainly preempted. What Section 1334(a) of the Act does say is that "[n]o statement relating to smoking and health, other than the statement required by Section 1333 of this title shall be required. . . ." Section 1334(b) states that "[n]o requirement or prohibition based on smoking or health shall be imposed under State law with respect to the advertising and promotion [of properly labelled cigarettes]. . . ." The Act's language covers state law of all kinds bearing on the subjects that Congress reserved to itself—whether of statutory, administrative or common law origin, and whether enforced through fines, injunctions or damage awards.

What is involved here, whether it is called implied or express preemption, is preemption based on the *text* of the Act, including a preemption provision expressly so labeled by Congress. Thus, the preemption that the federal courts of appeals have found is based on the terms of the preemption clauses of the Act, when interpreted in the light of Congress' statement

of policies and purposes in Section 1331. The implied preemption analysis here is nothing other than the process of construing the clear and comprehensive language of Sections 1331 and 1334. Most courts have accordingly found the question controlled by the plain language of the Act. *See Palmer*, 825 F.2d at 626 ("the language of the Act is straightforward and unambiguous"); *Cipollone*, 789 F.2d at 186 (Pet. App. 103a) (the language of the Act provides "a sufficiently clear expression of congressional intent without resort to the Act's legislative history").

The *Dewey* and *Carlisle* courts, notwithstanding the explicit terms of Section 1331, concluded that Congress had only a minor or peripheral concern over protecting commerce. (Pet App. 199a, 218a; Resp. App. 29a-31a). They also concluded that the imposition of tort liability based on claimed inadequacies in the federal warning is not really a "requirement" preempted by the Act because the manufacturers have a "choice" whether to give only the warnings explicitly stated by federal law to be adequate or pay damages for failing to give the variety of additional warnings that judges and juries may deem required under state law. (Pet. App. 202a-203a; Resp. App. 27a-28a). This is the argument that the First Circuit in *Palmer* dismissed as "disingenuous." 825 F.2d at 627. It is axiomatic that there can be no damage liability without breach of a duty imposed by state law. And it is too late in the day to argue that state law does not include common law or that damages actions do not have regulatory effect.[8] In the absence

[8] See *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938) (state law includes common law for purposes of federal jurisdiction); *San*

of an express provision preserving private damage actions,[9] this Court has treated common law duties as legal obligations for purposes of preemption.[10]

Congress did not leave to speculation (or "implication") either its essential purposes or the means by

Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236, 246-47 (1959) (state regulation "can be as effectively exerted through an award of damages as through some form of preventive relief"); *Illinois* v. *City of Milwaukee*, 406 U.S. 91,100 (1972) (there is "no reason not to give 'law' its natural meaning" which includes "claims founded upon federal common law as well as those of a statutory origin"); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 495 (1987) (allowing common law nuisance actions would allow states to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources"); *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 484 (1990) (noting that "state courts, exercising their common law powers, might develop different substantive standards," and that this "outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement").

[9] Even the presence of a savings clause will not preserve state law damage actions that would frustrate the objectives of the federal law (*see, e.g.*, *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 220-33 (1986); *Ouellette*, 479 U.S. at 493-95); but where there is no savings clause, there is no ambiguity that preemption of state law includes preemption of state common law. *See Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 100 S. Ct. 1781 (1990).

[10] The cases petitioner relies on (Pet. 15-16) are entirely consistent with this analysis. In *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), Congress indicated its express intention to preserve a common law action for damages through the Price-Anderson Act, and the only issue was whether this included punitive damages. In *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 182 (1988), Congress provided "the requisite clear congressional authorization" for enforcement of state workers' compensation laws " 'in the same way and to the same extent' " as other state employers, thus precluding preemption.

which these purposes were to be achieved. Congress declared in Section 1331 that its "policy" and "purpose" in passing the Act was "to establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." Pursuant to this policy, (1) consumers were to be given what Congress determined to be an adequate warning, and (2) commerce was to be protected "to the maximum extent consistent with this declared policy" and "not impeded by" disuniform and confusing warning and advertising requirements. To achieve these ends, Congress (1) itself specified the exact language of the warning requirement to be included on all cigarettte packages; (2) prohibited anyone from requiring any other health warning on cigarette packages; and (3) prohibited anyone from invoking state law for the purpose of imposing any requirement or prohibition relating to smoking and health on the advertising or promotion of cigarettes labeled in compliance with the Act.

Congress' objective applies no less forcefully to regulation through common law requirements imposed through damage awards than to regulation through statutes adopted by state legislatures. By permitting juries to make their own determinations about the adequacy of the congressionally mandated warning and the propriety of advertising and promotional campaigns, the decisions in conflict with the decision below threaten precisely the "diverse, nonuniform, and confusing" results Congress explicitly sought to avoid.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MELVIN SPAETH*
ARNOLD & PORTER
1200 New Hampshire Ave.
Washington, D.C. 20036
(212) 872-6669

Attorney for Philip Morris Incorporated

**Counsel of Record*

Of Counsel:

JAMES V. KEARNEY
WEBSTER & SHEFFIELD
237 Park Ave.
New York, NY 10017
(212) 808-6000

Attorney for Liggett Group, Inc.

DAVID K. HARDY
SHOOK, HARDY & BACON
One Kansas City Place
1200 Main St.
Kansas City, MO 64105
(816) 474-6550

Attorney for Loew's Theatres, Inc.

March 1991